FILE COPY.

Office Supreme Court, U.
FILED.
FEB 28 1907
JAMES H. McKENNE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 227.

BEHN, MEYER & COMPANY, Plaintiffs in Error.

v.

CAMPBELL AND GO TAUCO.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

CHARLES C. CARLIN,
HENRY E. DAVIS,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 227.

BEHN, MEYER & COMPANY, Plaintiffs in Error.

v.

CAMPBELL AND GO TAUCO.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

I.

Statement of the Case.

This is a writ of error to the Supreme Court of the Philippine Islands. The suit was instituted by the defendants in error as plaintiffs against the plaintiffs in error as defendants. In their complaint the defendants in error alleged substantially as follows: That, on June 20, 1901,

they contracted, in writing, with the plaintiffs in error, first, to build a dwelling house on land of the plaintiffs in error on the Pasig River, in Manila, as per plans and specifications attached to the contract, for the sum of 13,000 pesos, payable at intervals throughout the progress of the work; secondly, to install a water system to stable, kitchen, etc., and drain tubes from the same, for the sum of 500 pesos, and, thirdly, to construct a stable according to specifications, for the sum of 1,500 pesos, to be paid upon completion of the work; that the defendants in error fulfilled their part of the contract, any delays in the premises having been caused by changes ordered by the plaintiffs in error; that there was due from the plaintiffs in error on account of the dwelling house 1,500 pesos, and on account of water system 500 pesos; that on various dates and after the making of the original contract the parties contracted for alterations and improvements in and to the dwelling house and the premises on which it was situated, for which the entire sum of 5,417.51 pesos was due from the plaintiffs in error; that, on or about May 1, 1902, the plaintiffs in error took possession of the premises, and thereafter occupied them, to the exclusion of the defendants in error; that the successive changes, alterations and additions so far modified the original contract as to change entirely the amount and character of the labor to be performed and material required, as well as the time necessary for completing the contract, and that the defendants in error had carried out the several contracts and made a variety of changes, alterations and improvements outside of their contractual obligations, to the value of $2,333.12: Wherefore the defendants in error prayed judgment for 9,250.62 pesos, with interest. (Rec. 1-3).

The complaint was filed September 30, 1902, and on November 24 following the plaintiffs in error answered, admitting the making of the original contract and denying its

performance; admitting having contracted for certain of the extra work, but denying as to the rest; admitting having taken possession of the premises on or about May 12, 1902, but denying that they did so to the exclusion of the defendants in error, and denying all of the allegations as to the extra work claimed to be of the value of $2,333.12. The plaintiffs in error further alleged as follows: That the defendants in error did not complete the dwelling house according to the plans and specifications, or at all, but abandoned the work about May 1, 1902; that on February 25, 1902, defendants in error, at the request of plaintiffs in error, made a written statement of all work contracted for, and at that time the plaintiffs in error notified the defendants in error that no extra work or changes would be paid for unless agreed for in writing, and that, except as in the answer otherwise admitted or alleged, the plaintiffs in error neither requested nor consented to any changes, alterations, etc., and that all such not admitted or alleged in the answer as were made by the defendants in error were made wholly without the consent of the plaintiffs in error and at the sole risk and cost of the defendants in error. The answer further set forth in detail two counter claims, first, alleging that the defendants in error constructed the dwelling house in a negligent and unworkmanlike manner, and in violation of the contract and specifications in specifically enumerated particulars. In addition to the defects so specified, it was alleged that the workmanship of the entire house in all its particulars was negligent and bad, and the whole structure improperly built; on account of all which the plaintiffs in error have been damaged $30,000, Mexican; and, second, that, on June 20, 1901, the defendants in error contracted with the plaintiffs in error in writing to fill a certain lot on the bank of the Pasig River with earth and sand, at the rate of $1.30 Mexican per cubic metre; that the defendants in error represented to the plaintiffs in error that the amount

of earth and sand used in such filling was 62,690.50 cubic metres, relying upon which representation and the superior knowledge and supposed good faith of the defendants in error the plaintiffs in error paid them $81,497.65, Mexican; whereas, the total amount of earth and sand actually deposited, as defendants in error well knew, was 31,000 cubic metres, whereby the defendants in error were overpaid $41,-197.63, Mexican: Wherefore the plaintiffs in error prayed judgment against the defendants in error for $71,197.65, Mexican. (Rec. pp.3-6).

The defendants in error replied, denying the allegations respecting the first counter claim, and, as to the second, admitting the contract and the payment by the plaintiffs in error of $81,497.65, Mexican, for 62,690.50 cubic metres of filling, alleging that the defendants in error in fact delivered 64,-444 cubic metres of earth and sand, for which they were entitled to receive $83,777.21, Mexican, and praying judgment for the difference, $2,279.55, Mexican, on the second counter claim. (Rec. 8).

Thereupon the plaintiffs in error filed an amended answer, setting forth, first, that there was no way by which the house could be made safe and fit for occupation, except at the cost of 13,000 dollars, local currency; secondly, that the total amount of earth and sand actually deposited was 20,-935 cubic metres, and, thirdly, that they had demanded of the defendants in error repayment of 54,275 dollars, local currency, which had been overpaid, and which the defendants in error had had and received to the benefit of the plaintiffs in error and refused, and still refuse to pay; and praying judgment against the defendants in error for 67,275 dollars, local currency, as follows: $13,000 for damage sustained by reason of the negligent and faulty construction of the plaintiffs in error's property, and $54,275 money had and received by the defendants in error to the use and benefit of the plaintiffs in error. (Rec. 8-9).

The case was tried by the Court, Sweeney, Judge, without a jury, the Court finding facts as follows: That the contract of June 20, 1901, was entered into; that all of the items claimed for by the defendants in error aggregated in claimed value 22,750.62 dollars, Mexican, of which the defendants in error admit payment to the extent of 13,500 dollars, leaving a balance of 9,250.62 dollars, Mexican, as the amount of their claim; that the plaintiffs in error admitted the contract of June 20, 1901, and also an additional contract of December 28, 1901, for 4,000 dollars, making the contractual obligations of the plaintiffs in error in all 19,000 dollars, Mexican; and also that there remained unpaid of the contract price of construction the sum of 6,732 dollars, the payment of which was withheld as damages on account of the faulty construction of the work. And the Court further found as a fact that the plaintiffs in error had paid the defendants in error for at least 40,000 cubic metres of sand and dirt as filling for the lot of the plaintiffs in error, which was not put thereon by the defendants in error, amounting in the aggregate to 52,000 dollars, Mexican. As to the claim and counter claim on account of the construction of the dwelling house, the Court found that the defendants in error were not entitled to any other compensation than they had already received, because of their breach of contract in defectively doing the work, and that the plaintiffs in error were entitled to at least the unpaid balance as damages sustained by them in that behalf. (Rec. 9-12).

The Court, accordingly, adjudged that the complaint of the defendants in error be dismissed, and that the plaintiffs in error recover of the defendants in error 52,000 dollars, Mexican, and costs (Rec., 12).

The defendants in error excepted to this judgment and filed a petition, called in the Record a petition for a new trial, as follows:

> "Appear now the plaintiffs and move the Court that the case be reopened, for the reason that the findings of fact upon which the Court bases its judgment are clearly and manifestly against the preponderance of the evidence in the following respects," enumerating them, and "they also ask the reopening of the case for the following reasons: that the Court committed several errors of law, to the prejudice of plaintiffs, and that the judgment is contrary to law; that the trial was not equally just and impartial as regards plaintiffs and defendants." (Rec. pp. 12-13.)

This petition was heard and denied by the Court, and, as the Record recites, "to which decision plaintiffs likewise excepted, at the same time notifying the Court of their intention to prepare, perfect, etc., a bill of exceptions in appeal." (Rec. p. 12.) If there be a bill of exceptions in the Record it consists in the testimony, affidavits, etc., set forth on pages 15 to 96 of the Record, beginning with this introduction: "The following is the evidence introduced by both parties at the trial, with the exceptions taken, and which do not appear elsewhere in the Record" (Rec. p. 15), and ending thus: "The foregoing bill of exceptions having been presented for its approval on the 7th of August, 1903, by the plaintiffs in the above entitled matter, and defendants having been duly notified and an opportunity afforded them to be heard in regard to the correctness of said bill of exceptions, and the undersigned Judge, having examined the same and being of opinion that the facts as stated are correct, said bill of exceptions is hereby approved and ordered filed with the Record in this matter." (Rec. p. 96.)

On the appeal, the appellate court, overturning the findings of fact of the trial court in that behalf, found that the work on the building had been done in substantial compliance with the contract, and held, as matter of law, first, that "by the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substan-

tially as required by the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted" (Rec. p. 101); and, secondly, that, as there was no mutual mistake of fact in the measure of the sand and earth, the plaintiffs in error were estopped, and could not claim for any over-payment (Rec. p. 105). The Court, therefore, reversed the trial Court, and gave the defendants in error judgment for the balance claimed by them on the work on and about the dwelling house, namely, 9,250.62 dollars, Mexican. (Rec. p. 105.)

It is particularly to be noted that the appellate court made no finding of fact as to the amount of sand and earth put upon the lot, but in terms avoided so doing, as shown by its language, as follows: "The evidence, therefore, is uncertain, and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot." (Rec. p. 103, fol. 154.)

II.

Assignments of Error.

The Court below erred as follows:

1. In reversing the judgment of the Court of first instance.

2. In awarding the defendants in error $9,250.62, Mexican, or any sum.

3. In not affirming the judgment of the trial court in favor of the plaintiffs in error for $52,500, Mexican.

4. In finding as a fact that the work done in and about the dwelling house was performed in substantial compliance with the contract relating thereto.

5. In holding as matter of law that the fact of taking possession of the said dwelling house was an acknowledg-

ment by the plaintiffs in error that it was constructed substantially as required by the said contract.

6. In holding as matter of law that the plaintiffs in error were not entitled to recover their over-payments for earth and sand because no mutual mistake was shown in the premises.

7. In rendering judgment for a sum in Mexican currency instead of in Philippine pesos.

III.

ARGUMENT.

We will consider first the questions of law, which are, in the main, two: first, as to the effect of taking possession of the house, and, second, the nature and extent of the right to recover money paid through mistake.

The Effect of Taking Possession.

1. The fact of taking possession of a building upon the owner's own land does not of itself imply a waiver of performance, or have any real meaning as to such.

The cases on this point are so numerous and clear as to leave no room for doubt.

The court below, holding that the fact of taking possession of the house and occupying it was an acknowledgment that it was constructed substantially as required by the contract, added that in such case the owner receiving the house shall be bound to pay the full or reasonable worth of what he receives. It is accordingly deemed advisable to consider under this head, in effect, two questions, namely, what is the meaning and effect of taking possession, and what is the rule of damages where possession has been taken of a build-

ing not constructed in full compliance with the provisions of the contract.

> "In building contracts where the house is built upon the property of him who has it built, acceptance and use of the work, knowing it was done in accordance with the contract, is not a waiver. The owner is powerless to do anything else, unless he should pull the house down."
>
> Mohney v. Reed, 40 Mo. App., 99, 112.

> "The defendant might object to the work if he were cognizant of its defects, but it was on his building and had become a part of his property, and he could not very well reject it unless he tore it from the building and cast it away. The question in all such cases as this is whether there has been a waiver of defects, and not whether there has been an acceptance and use of the work. Use of the work is not necessarily a waiver of its defects. There must be both knowledge and acquiescence to constitute a waiver."
>
> Haysler v. Owen, 61 Mo., 270, 274.

> "The effect of acceptance in the present cases and cases of similar kind, in establishing a waiver on the part of the defendent of any rights he had under the contract, is certainly difficult to be maintained. When the work and labor and materials have been expended in the production of an article contracted for, not connected in any way with the property belonging to the party at whose instance the work has been done, the latter is at liberty to accept the same or not, as he chooses, and if he does accept, that is certainly a very clear indication of an intention to waive any defects so far as such defects might conduce to a defense against any recovery. * * * But where the plaintiff or contractor has done work on the house of the defendant, the fact that the defendant continues to live in his house can hardly be regarded as an acceptance of the work, as a waiver. * * * But

this idea of acceptance, as a waiver, is not the ground upon which the courts have allowed a recovery on a *quantum meruit* count. It is because the work is of no value to the proprietor, and if it is of no value there can be no recovery,"

Yeats v. Balentine, 56 Mo., 530, 538-9.

"In an action for the recovery of the contract price of a building, the fact that the defendant has accepted the building will not preclude him from recouping the damage he has sustained by reason of the plaintiff's omission to complete the building in time, or according to the specifications of the contract."

Adlard v. Muldoon, 45 Ill., 193.

"The instruction given by the Court * * * confounds the ordinary use and possession of the house in question by the defendant with the true legal idea of an acceptance. * * * Such acceptance is not manifest alone by use and occupation, for the reason that the house was built upon defendant's land, became incorporated with the realty, and the property thereof vested *nolens volens* in him. He had no choice but to use it, whether built according to contract or not, and such use, under protest, accompanied with complaint that the contract had not been performed by the undertaker could not be a waiver of his right to insist upon the due execution of the contract."

Corwin v. Wallace, 17 Iowa, 374, 376-7.

"The most common cases where questions arise as to the effect of acceptance and approval of acts done by others, are the cases of work done by contract, where the attempt is to resist payment of a full price, because of the defective character of the materials or workmanship. The general rule undoubtedly is, that if a party received, without objection, an article made for him by contract, having a reasonable opportunity to examine and know whether it is conformable to the contract, this is evidence that the party accepts it as a performance of his contract, and, if so accepted, is bound.

"The evidence results from the union of three circumstances: The voluntary receipt, the absence of objection, and the knowledge or opportunity to know the defects. The rule by no means applies equally to all classes of cases. It hardly applies, or with slight force, in cases where the party has no option to receive or reject the labor or services performed, where he has no means, or such as are imperfect, to know the defects or objections, or where he declares his objections, thus negativing any assent. Whenever the service performed is done upon the property of the employer, and cannot be separated, the owner has no power to reject, or refuse to receive it. A man who receives back his horse from a farrier furnishes no evidence that the animal has been properly shod, or that he is satisfied with the work. If he knows, and does not object, these facts together are evidence of acquiescence.

"In most cases where work and labor is performed upon real estate by contract, the mere fact that the owner makes use of the building or structure built upon his land, furnishes no evidence of approval or acceptance, because he has no choice to reject it. He cannot remove it from his premises without greatly injuring or destroying its value, nor can he remove it so as to render it useful to himself. The property has vested in the owner of the land, and he cannot divest himself of it except by the assent of others; and in the case of buildings erected upon his own land, for his own use, he has no choice but to use them as they are, whether they are satisfactory or otherwise.

"Alone, the use of such buildings gives no evidence of acceptance. Accompanied by silence and the absence of complaint, where to complain would be natural and suitable, or by any circumstances indicating acquiescence, it would be evidence."

Wilson v. School District, N. H., 118, 124-5.

Taking possession of real estate after work in constructing buildings has been done thereon and the contractor has left the premises, and appropriating to the

owner's use and benefit the labor and materials of the contractor does not constitute an unequivocal acceptance of the work, although it may be taken into consideration in determining that matter.

"When a person contracts with another to build, or to do some portions of the work in constructing, buildings upon real estate belonging to the owner of such real estate, his taking possession after the other has left the premises cannot be construed as an unequivocal acceptance, although he thereby takes possession of, and appropriates to his use and benefit, the labor and materials of the contractor. He must do so as a matter of necessity, in many cases, or suffer the property to stand idle and unused, to the great detriment of all parties, and especially so of the owner. The most that can be said in such cases is that the acts of the party and all the circumstances may be taken into consideration in the determination of the question whether there is an implied waiver of the condition precedent."

Hanley v. Walker (Mich.), 8 L. R. A., 207.

Where a contractor undertakes to build a house complete, and after doing a small portion of the work, abandons it without any default on the part of the owner, and the latter enters upon the premises and completes the house, making use of the contractor's unfinished work, the contractor cannot recover for what he did, nor can a sub-contractor recover from the owner for materials furnished such contractor. "It may be said that the plaintiff in error ought not to avail himself of the benefit of what has been done upon the contract, without paying what it was reasonably worth. But what was the appellant to do? Abandon his building site entirely? Could he not complete his house upon his lot, and even upon the foundation laid, without rendering himself liable to pay his defaulting contractor for what he had done? We think he might."

Malbon v. Birney, 11 Wis., 107, 110.

Where one party has entered into a special contract to perform work for another and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed on in the contract; yet if the work and materials are of any value and benefit to the other party, it seems that he may recover on a *quantum meruit* for the work done, and on a *quantum valebant* for the materials. In such case the proper measure of damages is the contract price of the house, deducting from it so much as the house was worth less on account of variations from the contract.

"When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant*, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive (substantial?) execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions."

Hayward v. Leonard, 7 Pick., 181,187.

Where the work is so done as to be useless, there can be no recovery. "It would be a reproach to the law if the plaintiff could recover the stipulated price of the work which he undertakes to perform, when by the evidence in the case it manifestly appears that the defendant would be entitled to a larger sum from him as damages for the non-performance of his contract with them."

Taft. v. Inhabs. of Montague, 14 Mass., 282, 285.

"The fact that the appellants took possession of the building cannot be considered as an acceptance of the work. The building was owned by them, and upon their premises, and they cannot be required to abandon it altogether so as to enable them to maintain an action for damages. They had no alternative but to take possession as they did, protesting all the while

that appellees had failed to comply with their agreement."

Escott v. White, 10 Bush, 169, 173.

Where a contractor builds a house on a lot for the owner thereof, the latter is not debarred of an action against the former to recover damages for a non-compliance with the contract, on the ground that he had accepted such house from the contractor, whether cognizant or not of such non-compliance at the time of the acceptance.

"When a house is built on a lot in a city, which if unimproved, is a source of great expense, how can we speak, with any propriety of language, of the owner's accepting a house built upon it? The lot is in his possession already; the buildings put upon the lot become a part of it. * * * The fact that the house has been used is a matter to be weighed by the jury with all the other circumstances of the case as bearing upon the question how far acceptance raises a presumption that the work met the contract requirements; and in the case of a building contract the fact of acceptance may be used with much less force than in the case of a sale of goods."

Stewart v. Fulton, 31 Mo., 59, 61.

"The party failing to perform can only recover such a sum as his labor has benefited the other party. Had he strictly and literally kept his agreement, he would have been entitled to the contract price. Failing in this, first, he must deduct from the contract price such a sum as would enable the other party to get the contract completed according to its terms; or, where that is impossible or unreasonable, such a sum as will fully compensate him for the imperfection in the work and the insufficiency of materials; so that he shall in this respect be made good pecuniarily as if the contract had been strictly performed; second, the party failing to perform must also deduct from the contract price whatever additional damages his breach of the contract may have occasioned to the other. In many cases

these damages would be considerable; in others, they might be nothing.

"It is only by considering both of these elements that we can ascertain the benefit which the one may have derived from the labor of the other, when measured by the contract and the contract price."

Bragg v. Bradford, 33 Vermont, 35, 39.

"The next case to consider is that of a party who has not fully performed, and has not been discharged from, the contract, or excused from further performance. His right to ignore the contract and recover a reasonable compensation for work done is to be determined by answering one or both of the following questions: (1) Has a partial performance for which recovery is sought resulted in financial benefit to the party from whom it is sought? (2) Is such default wilful, or is it caused by something beyond the control of the party in default, though not amounting to a discharge of his liability? If the partial performance for which recovery is sought has not resulted in financial benefit to the party against whom recovery is sought, the party who has performed such services cannot recover in any event. The fact that performance was prevented by some external fact beyond his control, or that the partial performance was expensive to him, neither of them gives him any right to recover more than the amount of the benefits conferred upon the party against whom the recovery is sought and if no such benefits existed, there is no right to recovery."

3 Page Contracts, Sec. 1601.

"A person receiving benefits without knowing of the breach, and if the benefits are of such sort that it is impossible for him to return the benefits to the adverse party, it is difficult to say why the party not in default should be held for liability which he did not assume by his contract. Thus, it has been held that as the owner of land on which a house has been built has no real choice in accepting or rejecting it, he is not liable to pay reasonable compensation therefor,

if the contractor does not complete the contract, at least substantially."

3 Page Contracts, Sec. 1605.
Dermott v. Jones, 23 How., 220.
Elliott v. Caldwell, 43 Minn., 357.

"To entitle a party to recover for part performance or for performance in a different way from that contracted for, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substituted performance. The mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise to pay for it. Hence, in the case of a building on land which the builder fails to complete, or completes in a manner not substantially conforming to the contract, the mere fact that it remains on the land and the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as will imply a promise to pay for it, notwithstanding the non-performance of the said contract; for the possession of the land necessarily involves possession of the buildings in their existing state, and the owner has no option of rejecting them."

Elliott v. Caldwell, *ubi supra.*

The cases cited by the Court below in its opinion in no wise militate against the rule clearly appearing from the foregoing authorities.

In Duell v. McCraw, 86 Hun. 331, the owner was let into possession of the house in knowledge of its condition, at her own request, and upon an express undertaking as to payment; and it was held that the conduct of the defendant operated a waiver of the architect's certificate as to the final payment provided for by the contract.

Where a contractor fails to perform his agreement to erect a building, and, after the expiration of the time fixed for performance, abandons the premises and the

owner goes on and completes the building, the owner's damages are the difference between the value of the premises as they were when abandoned by the contractor and what their value would have been had the building then been completed according to contract.

> "The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses rentable and productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon and insurance premiums. He could not on that day, had he been let into immediate possession and control, by any expenditure of money or energy have completed them at once; nor, in the nature of things, could he have supplied the lack of the completed houses by purchase in the market. The work needed to complete was one of time, and, while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding no rent. It is plain that to repay him just what he expended to finish the building would not make him whole; for he had to pay, beside the cost of building, interest to Granniss, and lose interest on his own mortgages, and pay taxes and premiums. To put him in as good predicament as he would have been had the buildings been done on the 1st of September, 1877, he should have the difference in value between the buildings thrown on his hands unfinished, and the houses as they would have been if completed according to the contract. This seems to establish the rule that will give him full compensation."
>
> Kidd v. McCormick, 83 N. Y., 391, 398.

The Court evidently meant to say that the plaintiff should have the difference in value between the buildings thrown on his hands unfinished and the value to him of the houses as they would have been if completed according to contract.

By a contract between plaintiff and defendant, the former bound himself, among other things, to put certain roads in good repair within sixty days, it being stipulated that the contractor should be deemed in default by the mere act of his failure in any particular, and the City Council was so authorized to declare it without applying to a court. More than a week having passed and the plaintiff not having commenced work, the City Surveyor advised that the contract be declared forfeited; but this advice was not immediately acted upon, and the plaintiff began the work, and before the sixty days had elapsed put most of the roads in repair. The city then declared the contract forfeited, and the plaintiff brought suit for damages. *Held,* that though the city had the right to forfeit the contract for neglect on the part of the plaintiff, it was yet not competent for it, after having been notified of the neglect of the plaintiff to complete the work subsequently, to stand by and see him prosecute the work without objection, and then insist upon such delay in the commencement as a forfeiture, and that, although the plaintiff did not complete them according to his contract, he was entitled to compensation for the benefit which the city derived from his labor.

Corland v. New Orleans, 13 La. Ann., 43.

A plaintiff may recover under a count upon an account annexed for work done and materials furnished in building a house upon a special contract, which he has substantially performed, and the measure of damages is the contract price, deducting the diminution in value of the house to the defendant caused by deviation from the contract.

Cullen v. Sears, 112 Mass., 299.

If a person elects to accept or accepts work imperfectly performed, according to contract, the benefit for which he is liable to be charged is the amount of value which he has received, if any, beyond the amount of the damage. The implied promise which the law raises is that he will pay such amount of the stipulated price for the whole labor as remains after deducting what it would cost to procure a completion of the whole service, and also any damage which has been sustained by reason of the non-fulfillment of the contract; but, if, in such case, it be found that the damages are equal to, or greater than, the amount of the value of the labor performed, so that the employer, having a right to the performance of the whole contract, has not, upon the whole contract, received a beneficial service, the contractor cannot recover.

Britton v. Turner, 6 N. H., 481.

And as respects this last case, see the comments thereon in *Davis v. Barrington*, 30 N. H., 517, 529, and the notes in 26 Am. Dec., 722, to the case itself, and in 19 Am. Dec., 272, to the case of *Haywood v. Leonard*, above cited.

Right to Recover Money Paid by Mistake.

2. We consider next the question of recovery of money paid by mistake.

For this case the question would seem closed by the express provisions of the law of the Philippine Islands.

> "If a thing is received when there was no right to claim it, and which, through an error, has been unduly delivered, there arises an obligation to restore the same." (Article 1895, Civil Code.)
>
> "It is presumed that there was an error in the payment when a thing which was never owed or which

was already paid for has been delivered, but the person from whom the return is asked may prove that the delivery was made through liberality or for any other sufficient cause." (Article 1901, Civil Code.)

And the principles expressed in these enactments are the same as those generally recognized and administered.

A person who, under a mistake of material fact, makes a payment which he is not under legal liability to make can recover the money thus paid if the other elements necessary in an action to recover payments are present. In other words, such payments are not looked on as voluntary payments.

2 Page Contracts, Sec. 818.

Where payment is made by one who is under no legal liability, under mistake of fact as to the existence of such liability, the weight of authority is that such payment may be recovered even if the party making it could have discovered his mistake if he had used proper diligence. The mere fact that the party making the payment had the means of knowing the facts does not prevent him from recovering. It is not the means of knowledge possessed by the party making the payment, but his actual knowledge or ignorance of material facts that determines his right to recover.

2 Page Contracts, Sec. 824.

Money paid under a mistake of fact may be recovered back, although the party making the payment has access to information, and by his own laches neglects to acquire it. Payment is not voluntary when made in consequence of a mistaken view of facts.

Baltimore, etc., Co. v. Faunce, 6 Gill., 68.

In this case the Court said (p. 77):

> "The case of Kelly v. Solari, 9 M. & W., 54, was fully considered. There the parties paying had at one time a knowledge of the fact, the forgetfulness of which subsequently induced them to make the payment. The Chief Baron, at *nisi prius*, instructed the jury that the previous knowledge or means of knowledge would prevent the recovery; but, on argument, he united with all the other Barons in the opinion that there must be knowledge existing in the mind at the time of the payment. Of what avail is it, in any view of justice or sound sense, that a man once knew or had means to know a fact, if, at the moment when alone such knowledge is particularly useful, he is actually ignorant of it?"

If money be "paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact."

Kelly v. Solari, 9 M. & W., 54, 59, per Parke, B.

> "Then there is a third case, and the most difficult one, where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too broadly to the jury when I told them that if the directors once knew of the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from receiving, must mean a knowledge existing in the mind at the time of payment."
>
> Kelly v. Solari, 9 M. & W., 54, 57, Abinger, C. B.

The rule and its reason have never been better stated than by the Court of Appeals of Maryland:

"It is a well-settled principle that, if a party, through some mistake, misapprehension or forgetfulness of facts, receives money to which he is not justly and legally entitled, and which he ought not, *in foro conscientiae*, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise on his part of pay over the amount to such owner; and if the money be withheld from the owner, an action for money had and received may be maintained."

George's Creek, etc., Co. v. Commissioners, 59 Md., 255, 259-60.

Where money is paid upon the supposition that a specific fact which it is supposed would entitle the other to maintain an action is true, which fact is not true, an action will lie to recover the money back "upon the ground that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid had no right either to receive or retain, and which, had the true state of facts been present in his mind at the time, he would not have paid."

Ingalls v. Miller, 121 Ind., 188, 190.

To contend to the contrary would be to contend that legal responsibility is matter, not of intelligence, but of alertness of memory; that a momentary lapse of memory is legal default; and that Homer, for his occasional nods, might properly have been mulcted in damages at the suit of Horace. Et idem indignor Quandoque bonus dormitat Homer. Horace: *Ars Poetica.*

If A pay money to B in performance of a contract between them, under the mistaken belief on A's part that B has performed such contract fully, A may recover such payment. Thus, where B had agreed to plaster a house for A, and A paid him, believing that such work had been done,

he may recover the money thus paid where the work is of such inferior quality as to be valueless.

Nollman v. Evenson, 5 N. D., 344 (quoted in Page, Sec. 819).

Where a city engineer, by mistake, estimated the area paved to be about 3,000 square yards more than it really was, and, in reliance upon such estimate, the city paid the contractor for the entire amount of the engineer's estimate at the rate of $1.00 a square yard, it was held that the city could recover from the contractor on learning of the mistake.

Duluth v. McDonnell, 61 Minn., 288. *Ibid.*

Where a payment is made under a mistake in putting the weight of the articles sold, on which weight the payment is based, money paid under such mistake may be recovered.

McRae, etc., Co. v. Stone, 119 Ga., 516.

While the mistake under which payments whose recovery is allowed are made may be mutual, it is not necessary to recovery that it should be mutual. The doctrine of mutuality of mistake applies primarily to mistakes in expression, and has no application to payments by mistake.

Stotsenburg v. Fordice, 142 Ind., 490. (A very well-considered case.)

In an action to recover back money paid by mistake, it is no defense that the plaintiff had means at his command of ascertaining the truth, and that he omitted to use vigi-

lance and care. Nor is it a defense that the defendant can not be restored to his original position upon paying back money.

Kingston Bank v. Eltinge, 40 N. Y., 391, 100 Am. Dec., 516.
See Devine v. Edwards, 87 Ill., 177.

Discussion of Facts.

In discussing the facts in this case, we shall do so, first, with reference to the contract relating to the house, and, secondly, with reference to the contract relating to the filling of the lot of ground upon which the house was constructed. These were the only two issues of fact.

First: The defendants in error, to maintain the issue on their part, called six witnesses on direct examination, and two of the same witnesses again in rebuttal, while the plaintiffs in error called four witnesses.

The testimony of the witnesses called by the defendants in error on direct examination related largely to the construction of the house, in an effort to show that the structure was erected in accordance with the specifications and plans, and that the work was conducted under the supervision of a Mr. Duff, and subsequently a Mr. Cook, who were representatives of the plaintiffs in error.

An examination, however, of the testimony, discloses the fact that the faulty construction consisted principally in the manner of the work done upon the piers upon which the structure rested, and the defective roof, the faulty construction of the rafters supporting the same, and the general unworkmanlike manner in and about the entire structure, eliminating, to a large extent, the question of materials, and reducing the controversy to the question of negligent, im-

proper and unskillful workmanship. The defendants in error undertook to escape responsibility for such by reason of the employment of the aforesaid representatives at the work. In this they entirely failed, as will be seen by the testimony of Mr. O. F. Campbell, one of the defendants in error (Rec., p. 19), which is as follows:

> "Q. When did Mr. Duff, who you said was one of them, begin his work as supervisor of that building for Behn, Meyer & Co.?
>
> A. He began when he ordered the change of those posts. It was shortly after we had commenced the work on the building that Mr. Duff came out there and first gave us levels for the sand, and afterwards went over the house and made the modifications that he deemed necessary in regard to the foundations and the posts."

Again (same page) the witness testified as follows:

> "Q. At what stage, Mr. Campbell, was the house when Mr. Duff first appeared upon the scene?
>
> A. I think, as I remember, that some of the posts were up, and some of the joists and tie beams were already on.
>
> Q. Was the house in condition for him to go over it?
>
> A. Yes, sir. We went up on the ladder and went over these joists and looked at the timber."

The foregoing testimony of Campbell, one of the defendants in error, shows conclusively that the piers, fifty-four in number, about which the principal controversy here arises, were constructed, and upon them the building, or a large portion thereof, was under process of erection when Mr. Duff first came upon the scene, which, according to defendants in error's witness Dittmar (R., p. 30) was about the middle of October; and according to the witness Campbell (R., p. 19) the building was begun in September. And by

the reading of the testimony of the witness Campbell, as above quoted, the faulty construction of the piers, which consisted in the failure to place the same properly upon cement bases, was, at the time of Duff's appearance, concealed beneath the ground, and the defects could only have been subsequently disclosed, as they were by the examination of the experts, Case and Loper, who dug down to the base of the said piers and discovered the negligent, unskillful and unworkmanlike manner of their construction (R., pp. 42 and 58); and the further fact that they were not constructed in accordance with the plans and specifications, as will be seen from the testimony of Major Case (R., p. 42), which is, in part, as follows:

> "I made my first examination on January 11th, and have my field notes here. In the first place, the specifications for the foundations provided that the posts should be set on a stone foundation of one cubic meter —1 meter x 1 meter x 1 meter; several of these foundations have been dug out, exposed, and I examined them; two of those footings I found with the foot of the post set in the middle, running down half way through this stone foundation, giving only half of a cubic meter of foundation under the post; the balance of the stone work above the foot of the post gave no advantage whatsoever to the foundation. I examined five of these posts altogether."

From this defective construction the cause for the water running into the dining-room, instead of running off from the porch, is easily discernible, and that falling water had found such a course is proven by the testimony of Major Case (R., p. 42), which, in part, is as follows:

> "This porch, in place of sloping towards the outside, so as to drain away from the house, actually slopes into

the house, so that any rain going on to the porch will run into the house."

And again, on page 43, the same witness testifies as follows:

"Q. Now, Major, as to the posts that you examined, you state that you examined five of the posts. Were they the main posts of the house, or the posts of the porch?

A. They were all of the main posts of the house.

Q. Were the posts that you examined the important posts for maintaining the structure of the house?

A. Some of them, yes, sir."

It is impossible to read the testimony in this case without concluding that the piers supporting the posts, which in turn supported the house, were so defectively constructed as not to furnish the support designed, and that the house, as a consequence, had sunk, which is proven by the testimony of the same witness (R., p. 43), which is as follows:

"The second floor is quite noticeably uneven. In my opinion, this is due to settlement of the house."

Again the same witness (same page) testified as follows:

"The roof trusses at the hips have pulled apart. In my opinion this is due to the settlement of the house toward the edges, where it carried the heaviest load towards the walls, while in the center of the house, supporting the king post that runs to the peak of the roof, that did not settle so much, and the settling of the outside, in my opinion, is the cause of pulling the main rafters apart from the king post."

This witness is corroborated by the testimony of Robert M. Loper, a witness called for the plaintiffs in error (R., pp. 58-9), which is, in part, as follows:

"I found, by examining the foundations of five posts carrying the greater part of the weight of the building, that the foundations for the posts were respectively a half meter below the bottom of the posts for three of the posts, or three layers of Guadalupe stone * * * or say, approximately, about sixty-five centimeters in depth. * * * The condition of the roof structure, the frame work of the roof showed that there had been a settlement of the building * * * the settlement of the building showed the indisputable fact that the posts carrying the main wall of the building had settled considerably more than the other posts, as evidenced by the fact that the second floor was dished in, or depressed in towards the center from the outer porch, the result of which would be that any water getting in any way upon the porch floor itself would flow into the house. * * * The evidence of the building having settled was further manifest by the fact that the rafters in every case, in some cases more than others, but in every case, they had pulled away from the king post."

The same witness, on page 60, testified as follows:

"If by workmanlike work is meant work that is done by a good carpenter, I would say it wasn't a workmanlike job."

These two witnesses are corroborated by the testimony of Arnold Dittmar (R., p. 75), as follows:

"Q. You state that the water came in the doors?
A. Yes.
Q. Describe it.
A. Well, the balcony goes sloping in that direction; consequently when the rain comes on to the balcony it must run with the slope into the dining-room. Furthermore, there used to be a big pool of water in front as soon as the rain came. It was sloping, too, and the water couldn't run off."

The evidence of the plaintiffs in error discloses other important and serious defects in the workmanship throughout the entire building, the roof itself being seriously defective and faulty, with large holes through which daylight could be seen. (Testimony of James F. Case, R., p. 44).

But it is not deemed essential to go further into details except to say that this state of facts is not refuted by any of the witnesses for the defendants in error. There were only three witnesses called by the defendants in error who testified upon the question of faulty structure, namely, Delmar W. Smith, who testified to the effect that THE HOUSE WAS HABITABLE (R., p. 34); Vicente W. Pastor, who testified to the effect that he saw few, if any faults or defects in the construction of the house, and Cayetano Arguelles, who testified to the same effect, the latter witness, however, distinctly testifying with reference to the pillars and posts (R., p. 40), WE HAVE NOT HAD SUFFICIENT TIME TO CAREFULLY EXAMINE THEM.

It will therefore be seen from the testimony that the defective work, which resulted in the greater and subsequent injuries, was done before the appearance of the representatives of the plaintiffs in error, or occurred as the result of such defective work at or about the time that possession was taken of the property, and that the examination of the experts, Case and Loper, disclosed beyond any question, the conditions referred to. It therefore becomes proper to examine the testimony to see what was the nature of the acceptance and the manner in which the property was taken over by the plaintiffs in error.

The defendants in error in the trial Court, as in the appellate Court, relied upon the taking over of the property by the plaintiffs in error as a waiver of the defective workmanship and faulty and negligent construction.

And this brings up to the consideration of the facts as disclosed by the record, relating to the taking over of the property. And strange as it may seem, the record is almost silent upon the circumstances incident to the taking over of the property. Campbell, one of the defendants in error, on page 17 of the Record, testified as follows:

> "Q. Will you state when you made this delivery?
> A. I think it was about the first of May, a little bit more or less.
> Q. Of this year?
> A. Of last year, and they, I believe, entered the house about the tenth or the twelfth day of May of last year."

And Mr. Dittmar, one of the plaintiffs in error, on page 75 of the Record, testified as follows:

> "Q. Mr. Dittmar, did you ever accept by any writing or any agreement with Campbell and Go Tauco, the house as finished?
> A. No.
> Q. Why did you refuse to accept it, if you refused?
> A. The house had too many defects. I had to live in it, but practically it was not habitable."

It will be remembered that the complaint in this case did not allege any acceptance, but only "that defendant took possession of said premises." (Par. 7 of complaint.)

The above testimony, coupled with the fact that the plaintiffs in error withheld the balance of the money due, amounting to about forty-five hundred ($4,500) dollars in United States currency, the latter a significant circumstance, is all that the Record discloses about the taking over of the property; but as the house was constructed upon the land of the plaintiffs in error, there was nothing left for them to do

but to take possession thereof, or else to leave their land in the possession of the contractor, and it will appear, when we discuss the question of the land, and the filling therein, that on April 28, a few days prior to the taking of possession of the house, the plaintiffs in error notified the defendants in error that they were dissatisfied with the filling of the land, and that they would require to be reimbursed by them (R., pp. 86-7). About two weeks afterwards, they moved into, and took possession of the house and the land. It is therefore contended that within the rule of law, as understood by the plaintiffs in error, there was no such acceptance as would constitute a waiver of defective workmanship, and indeed, the testimony shows that there was no intention of waiver, and that the defendants in error had notice that it was the intention of the plaintiffs in error to assert their rights, and that the finding of the lower Court with reference to this item was correct. Said finding will be found on pages 11 and 12 of the Record and is as follows:

> * * * "Clearly establishes that the building in question was not constructed according to the contract; that the foundation is so constructed that the center of the building, where the great weight is, has settled much more than the outer support, and that causes the water that falls on the porches and outer parts of the building to run in on the floors of the rooms. From the proof, the plaintiffs must have entrusted this work to a lot of unskillful, careless men as carpenters, without any attention from the plaintiffs. The preponderance of the evidence is that it will cost to put this property in a condition to comply with the plans and specifications and contracted alterations 62½ per cent of the contract price." * * * "I have concluded that an equitable adjustment of this matter is to deny the plaintiffs any other compensation than they have already received, because of their breach of contract in so defectively constructing the improvements of the defendants; and that the defendants are entitled to at least the unpaid

> balance as damages sustained by them on account of the manner in which these improvements were constructed by the plaintiffs.'

The appellate Court, in reversing the findings upon this branch of the case of the trial Court, proceeded upon a mistaken idea of the law, that the acceptance of the property was a waiver of all defects of workmanship; and upon a mistaken idea as to the time that the representatives of the plaintiffs in error went upon the property for the purpose of observing the work, and lost sight of the fact that the representatives or inspectors did not appear until after the pillars were in the ground, for upon pages 99-100 of the Record, the appellate Court says:

> "The plaintiffs are not to be held in damages for following these plans, especially when they were followed under the eyes of the defendant's engineer and without objection from him."

It would seem that the construction of this house was wholly without and devoid of intelligent workmanship, as illustrated by the fact that when the house was completed, it was found that there was no door by which it might be entered, and that the owner, who had been absent in Europe, upon his return had to order a door to be cut in the same, and this was made an item of extra charge by the contractor. (R., top p. 80).

Second: The contract for the filling of the lot of ground, was made on the same day as the contract for the construction of the house, viz., June 20, 1901 (R., p. 7), and they were practically one and the same contract, except that they related to different departments of work and were under different writings. The parties were the same, and the acts contemporaneous. The contract for the filling of

the lot provided that the plaintiffs in error should pay the sum of one dollar and thirty cents ($1.30), Mexican currency, per cubic metre. The work was begun and the plaintiffs in error from time to time paid for the same in the total sum of eighty-one thousand, four hundred and ninety-seven dollars and sixty-five cents ($81,497.65), Mexican currency, for the supposed delivery of sixty-two thousand, six hundred and ninety and fifty-one one-hundredths (62,690.510) cubic metres of earth and sand, when it was discovered that there was a *mistake* in the measurement by the person, an employee of the plaintiffs in error, whose duty it was to make measurements for the same; whereupon, the plaintiffs in error, on the 28th day of April, 1902, before taking possession of the same, possession having been taken on the 12th of May, 1902, wrote the defendants in error as follows (R., bottom p. 86, Exhibit K (3).):

"MESSRS. CAMPBELL & GO TAUCO,
Manila.

GENTLEMEN:

Your bills for filling up our Uli Uli property have been checked, and it has been found that about 60,000 cubic metres have been paid for.

As we did not get a satisfactory explanation from you, we have put the matter before our attorneys, and have been advised that you would be responsible unless you could give satisfactory proof that a quantity of about 60,000 cubic metres was spread over the ground. As the total area is less than 20,000 square metres, the average of filling up—including a fair allowance for shrinkage—must exceed at least two metres and a half.

We therefore ask you to show to our representative, Mr. G. W. Cooke, Plaza Moraga, No. 7, which way the 60,000 cubic metres were disposed of, as we are in a position to prove that in a great many places the height of the sand does not reach one metre and sixty centimetres, you must be able to show places where at least double that quantity has been used.

If you cannot give those particulars within the next three days, that is, on or before the 1st of May, 1902, our attorneys are instructed to take up the case at once.

Yours truly,

BEHN, MEYER."

It will be seen from this letter that there had been a previous conversation or correspondence between the parties with reference to this work, and that the defendants in error were given an opportunity before the alleged delivery on the 12th of May to substantiate the measurements for which they had received pay. The defendants in error at the trial contended, as they had with reference to the house, that as the measurements had been supervised by the agent of the plaintiffs in error upon the ground and accepted, and paid for by the plaintiffs in error, they were not entitled to recover the excess amounts paid, even though it should appear that the measurements were incorrect. This view of the law was discarded by the trial Court, but sustained by the appellate Court, which held that the doctrine of estoppel applied, and that the plaintiffs in error here could not recover (R., p. 105). The appellate Court also found a state of facts which did not exist in the Record and which, instead of being proven, was absolutely disproved by the facts in the case, viz.:

"It was, before it was filled, a rough piece of land covered with very deep ditches."

This finding of fact by the appellate Court rests entirely upon the testimony of O. F. Campbell, Record, page 18, and the reverse was proven to be true, the Court copying the question asked the witness as a part of the answer. Nowhere in the Record does it appear from any fact testified to that the conclusion drawn by the appellate Court could be justified. The evidence on this point was so clear and

unmistakeable that it is surprising that the appellate Court should have fallen into such an error of fact.

Johann Menzi, Record, pages 56-7, testified that he was familiar with the appearance and topography of the land prior to the construction of the house and when the sand was placed on the land; that it was a zacate field, a grass field, and that it was an even grass field, divided into four parts.

> "Q. What do you mean by 'even?' Level?
> A. Level, yes.
> Q. What opportunities had you for knowing how that land did lay?
> A. Well, I have been in Manila six years and I passed there very often. I used to live in Nactajan, and had to pass there every day for about one year, and afterwards I passed sometimes." (R., p. 57.)

Mr. Dittmar, Record, page 78, testified as follows:

> "Q. Are you familiar with the topography of that land at the time you purchased it?
> "A. Yes, sir. * * *
> "Q. What was the topography of the land itself?
> "A. There were at first four squares of zacate fields, and on that property running parallel to the River Pasig there were seven to nine nipa buildings, nipa shacks.
> "Q. Aside from these mounds, which divided the tract into four zacate fields, were there any other irregularities in the topography?
> "A. No.
> "Q. Just state what sort of a field it was so that the Court can understand.
> "A. A zacate field must be almost level.
> "Q. State whether this one was or not.
> "A. Certainly; there were all four zacate fields.
> "Q. Have you been over the land?
> "A. Yes, several times.
> "Q. After you bought it?
> "A. After I bought it."

The testimony of the two witnesses referred to, as quoted above, proves the topography of the land to have been level earth and not filled with ditches, as found by the appellate Court. The testimony of these two witnesses stands unimpeached and uncontradicted; and having proven the land to be level, if, in order to establish beyond all doubt the correctness of the measurements which were made thereon, it were necessary to show further that the land itself was hard and firm and would not give or yield to the weight of sand which was afterwards placed upon it, this fact was established by the testimony of Major Case, Record, page 55, as follows:

> "Q. Do you believe that it was the former earth of a grass field?
> "A. Yes.
> "Q. On what do you base your opinion?
> "A. The filling was all of sand; the bottom under the sand is all of clay; the clay is there and it must have been there before the sand was put on, so I concluded that it was the original soil."

Mr. Robert M. Loper, who was shown to be an expert, on Record, page 70, testified as follows:

> "Q. When you went down the holes, will you state what kind of a soil you found down there—soft, hard or what?
> "A. The soil of the bottom of the hole was reasonably firm.
> "Q. Was it sand?
> "A. Very, very slightly mixed with sand. No more sand than you can find in soil."

Having established the land to be level, and the bottom to be of clay, it was a simple matter then for accurate measurements to be made as to the quantity of sand placed upon the lot of ground; and even though the bottom should have

been other than hard, it will be observed from the testimony, Record, page 70, that the line of demarkation was perfectly plain between the sand used in filling and the natural soil, and that accurate measurements were made by competent experts, whose testimony stands unimpeached and uncontradicted, and who found that it was impossible to have placed upon this soil any more than 20,965 metres. (Case's testimony, Record, page 46):

> "Having determined the area and the average approximate thickness of the filled area, the resultant cubic contents is obtained by multiplying one by the other, which gives the result of 20,965 cubic metres of filling in the property. These figures can be taken as approximately correct."

Robert M. Loper, an expert engineer, testified as follows, Record, page 64:

> * * * "The ascertained depth of this fill, or average thickness of the fill, showed that the amount of sand that had been deposited upon this property must have been 20,935.27 cubic metres deposited on the land of sand or fill."

Again, the same witness (same page) testified as follows:

> "Q. On the assumption, Mr. Loper, that that property was approximately level when the filling was put on there, are you certain that the quantity of sand which you testified the filling amounts to is all that was put on it?
>
> "A. Beyond a doubt. If the land was level, there can be no question as to the amount of filling that was put on there.
>
> "By the Court: How much filling did you say there was?
>
> "A. 20,935.27 cubic metres."

By this testimony it will be seen that the plaintiffs in error here were entitled to recover from the defendants in error the difference between the actual measurement and the amount paid for, which the trial Court found to be (Record, page 12), at least 40,000 cubic metres of sand, making in dollars and cents the aggregate sum of $52,000.00, Mexican currency. As against this abundant and convincing proof, it was, as heretofore stated, contended that the measurements of the agents of the plaintiffs in error, who were the only persons who were supposed to have measured the sand as it was delivered, were conclusive and that, having accepted and paid for the sand, the mistaken measurements could not be corrected, and the defendants in error in the trial court put upon the stand the agent who made the measurements, viz., George Ignacio Cercal, whose incapacity for such measurements was clearly proven upon cross-examination. (Record, pages 32-3.)

"Q. Where were you educated?
"A. In a German school.
"Q. How long did you go to school?
"A. Six years.
"Q. Did you study mathematics?
"A. I have studied how to read, write and make accounts.
"Q. How do you measure a cubic foot?
"A. I measure the height, the thickness, and the length.
"Q. How do you measure a cubic metre?
"A. In the same way as I explained.
"Q. Well, how did you measure the cubic contents of the banca?
"A. I only measured the water line of the banca."

* * * * * * * *

"Q. How much would a banca contain that was three metres long, two metres wide, and one metre deep; how much does that contain?
"A. Four cubic metres."

From this answer it will be seen that the incompetency of the witness, who was the agent measuring the sand, is proven, as the correct answer would be to the question propounded—six cubic metres.

Again, the incompetency of the same witness to measure sand is proven, Record, page 33:

> "Q. How many cubic metres would a banca hold that was three metres fifty long, one metre fifty broad, and fifty centimetres deep?
> "A. Five and a half."

The correct answer to this question is 2.62½ cubic metres. This witness was the agent or employee in charge of the work a portion of the time, doing all the measuring for both the defendants in error and the plaintiffs in error. That this witness did all of the measuring is proven by the testimony of the defendant in error O. F. Campbell, Record, page 26, which is as follows:

> "Q. Now, Mr. Campbell, you stated that the sand that you put on the Behn, Meyer & Co. property was measured by the representative of Behn, Meyer & Co. Did anybody representing you measure it?
> "A. My man merely was there to see that the filling went on and to receive the receipts from Behn, Meyer's representative."

Again, the same witness, Record, page 27, testified as follows:

> "Q. You stated awhile ago, Mr. Campbell, I understood you, that your representative didn't measure the sand delivered. Is that correct?
> "A. It was not measured actually by any man, but the two men were there together. It was in charge of Behn, Meyer & Co.'s man."

With these facts before the trial Court, which had an opportunity to observe the witnesses who were testifying and their conduct while so doing, it is not surprising that the trial Court, in its opinion, Record, page 11, should have found:

> "The plaintiffs attempted to rebut this evidence by three or four witnesses. Taking them together, their manner of testifying, their intelligence, and their apparent knowledge of the matters about which they spoke, their evidence was without much weight. One of these witnesses, Vicente Pastor, who claimed to be a civil engineer, showed himself to be what is known in the books as a swift witness, and did not impress the Court as an expert, nor did he show that he had made such observations, measurements, and calculations as would entitle his evidence to much weight."

It will be observed from the reading of the testimony that Vicente Pastor was the star witness for the plaintiffs in error at the trial Court and the one upon whose testimony they largely relied. And yet, the Court finds him to be a swift witness and incapable of correctly testifying about the matters in controversy. The appellate Court, without the opportunity of observing the witnesses, their conduct and their intelligence, reversed all the findings of fact of the trial court, and they did so under mistaken impressions as to both the law and the weight of the evidence.

And the observation of the court on the witness Pastor, just quoted, clearly eliminates him from the case, upon the familiar principle that the decision of the trial court on the point whether a witness be an expert will be deemed conclusive unless clearly shown to be erroneous.

> The Stillwell & Bierce Mfg. Co. v. Phelps, 130 U. S., 520.
> Perkins v. Stickney, 132 Mass., 217.
> Marston v. Dingley, 88 Me., 546.
> N. J. Zinc Co. v. Lehigh Zinc Co., 59 N. J. L., 189.
> Stevens v. Minneapolis, 42 Minn., 136.

Attention is also called to the following language of the trial Court, Record, page 11:

> "To my mind it is conclusively shown that not more than 21,000 cubic metres of filling were placed by the plaintiff on this lot. This is corroborated in part by the latter part of the filling contract, which appears in the records as plaintiff's Exhibit B, on page 30, which reads: 'Amount to be furnished will be over 15,000 cubic metres.' This indicates to me that it was in the mind of the contracting parties at the time that the amount of filling would not be very far in excess of 15,000 cubic metres."

Conclusion.

It thus abundantly appears that the Court below plainly erred respecting each of the two propositions of law applied by it to the case, namely, first, as to the effect of taking possession of the building; secondly, as to the right to recover money paid by mistake; and, also, in overturning the findings of fact by the trial Court.

On the first proposition of law, the Court held, against practically all the authorities, that the mere fact of accepting the house and occupying it involved an acknowledgment that it was constructed substantially as required by the contract, plans and specifications; whereas it is the law that acceptance, to have such effect, must be under circumstances which, in addition to the mere act of taking possession, indicate such taking to be in such knowledge of, acquiescence in, and intention to submit to existing defective work and materials; and the facts of the case clearly show that the acceptance was practically forced upon the plaintiffs in error and was wholly unaccompanied by any such circumstances as those indicated.

On the second proposition of law, the Court erred also equally against practically all, if not all, the authorities, that money paid under a mistake can not be recovered unless the mistake were mutual or accompanied by some elements of fraud or deceit; whereas the law is that all that is necessary to entitle one paying money under a mistake to recover it back is to show that it was received under circumstances making it against conscience for the recipient to hold it, no matter what the character of the ignorance, or the extent of the carelessness, of him making the payment.

And, thirdly, as to the facts, the testimony clearly shows that, as found by the trial Court, the work on the house failed to meet the contract requirements, or the requirements of proper workmanship and character of materials, to the extent at least of the unpaid balance of the money payable had the work and materials been proper in character; and that as to the filling of the lot the measurements clearly established the excess for which the plaintiffs in error were charged and paid.

Since the decision of the case at bar by the Supreme Court of the Philippines, this Court has decided the case of De La Rama v. De La Rama, 201 U. S., 303, holding that, even where there was a literal compliance with the provision of Section 497 of the Philippines Code of Civil Procedure, empowering the Supreme Court of the Islands to review the evidence in a case, that Court should not reverse the findings of fact of the court of first instance, unless such findings were plainly and manifestly against the weight of the evidence; and, in the De La Rama case, this Court reversed the Supreme Court of the Philippines, because it had set aside findings of fact of the lower court upon an insufficient showing that they were so against the weight of the evidence, and, accordingly, remanded the case with the necessary result of reinstating the conclusion and judgment of the court of first instance. This case is directly applicable

to the case at bar and should rule it. As already shown, the court of first instance had before it the witnesses, a fact to which reference is made in its opinion, and it passed upon the evidence in the light of the character, appearance and bearing of the witnesses, as well as upon a careful analysis of the evidence itself. And the findings of that court are not so plainly and manifestly against the weight of the evidence as to have justified the Supreme Court of the Philippines in its decision; on the contrary, a just and simple consideration of the evidence can properly lead to no other conclusion than that the court of first instance was right.

The seventh assignment of error is based upon matter not appearing in the Record, but matter of statutory law.

The Record shows that the judgment in favor of the plaintiffs in error was rendered on July 8, 1903, for the sum of fifty-two thousand dollars, Mexican. At that time, what was known as Mexican currency was legal tender in the Islands and was, in fact, the money of the country.

On January 27, 1904, by act numbered 1045 of the Philippines Commission, it was provided that all judgments thereafter should be in Philippine pesos, which is the new money of the country and legal tender. The judgment of the Supreme Court of the Philippines reversing the judgment of the court of first instance was rendered on April 2, 1904, more than two months after the passage of the act mentioned, and was for the sum of nine thousand, two hundred and fifty dollars and sixty-two cents, Mexican, instead of being that, or any other amount, in Philippine pesos.

Although no objection to the form of the judgment was noted, or exception taken thereto, the defect in the judgment is so radical that it cannot stand, and, if for no other reason, the judgment should be reversed, as plainly unwarranted by law.

The judgment of the Court below should, therefore, be reversed, and the cause remanded to that Court with directions to reverse its judgment and affirm the judgment of the trial Court.

Respectfully submitted,

CHARLES C. CARLIN,

HENRY E. DAVIS,

Attorneys for Plaintiffs in Error.